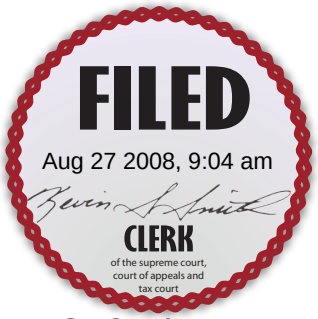

PRO SE APPELLANT:

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IN THE
COURT OF APPEALS OF INDIANA

ANTONIO SIMS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0712-CR-673
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0706-FB-112381

August 27, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Following a bench trial, Antonio Sims was convicted of Class B felony carjacking, Class C felony robbery, Class A misdemeanor intimidation, Class B misdemeanor criminal recklessness, Class D felony resisting law enforcement, and Class A misdemeanor resisting law enforcement. On appeal, he argues that his convictions for carjacking and robbery violate Indiana's prohibition of double jeopardy and the single larceny rule. We agree and reverse Sims's conviction for robbery.[1] Sims also contends that his aggregate twenty-one year sentence is inappropriate in light of the nature of the offenses and his character. Concluding that the nature of the offenses and Sims's character do not render his sentence inappropriate, we affirm his sentence.

Facts and Procedural History

On June 17, 2007, Indianapolis resident Kathy Germann and her husband, Gordon, spent the afternoon with their two grown children and their families because it was Father's Day. Kathy and Gordon went home between 6:00 and 6:30 p.m. Their daughter, Sarah Craft, later called and invited Kathy to accompany her on some errands. Sarah picked up Kathy around 8:45 p.m. in her van.

The two women drove to a nearby Speedway station, and Sarah got out of the van to enter the store before pumping gas. Kathy stayed inside the van, and the keys remained in the ignition. A man, later identified as Sims, opened the driver's side door and demanded, "Give me all your money, B****." Ex. p. 38. Kathy saw what she believed was a gun pointed at her face. Sims climbed into the van's driver's seat, and

[1] Sims also argues that his convictions for robbery and criminal recklessness violate double jeopardy principles. However, because we are reversing Sims's conviction for robbery, there can be no double jeopardy violation, and we need not address this argument.

Kathy tossed her purse to him. He told her to get out of the van, and, as she struggled with her seat belt, Sims warned her not to look at him or he would "blow [her] f***ing head off." *Id.* at 41. Once Kathy was out of the van, Sims sped away. Police located him with the van a short time later. Sims led police on a high-speed chase before jumping out of the van and fleeing on foot. While running from police, Sims dropped purses belonging to Kathy and Sarah. During a subsequent search of the van, police found a pellet gun on the front passenger side floorboard. After his arrest, Sims signed a waiver of rights form. He then confessed during a taped interview.

The State charged Sims with Count I: carjacking, a Class B felony,[2] Count II: robbery as a Class B felony,[3] Count III: intimidation as a Class C felony,[4] Count IV: criminal recklessness as a Class D felony,[5] Count V: resisting law enforcement as a Class D felony,[6] and Count VI: resisting law enforcement as a Class A misdemeanor.[7] Sims waived a jury trial, and the trial court conducted a bench trial and found him guilty as charged. When entering judgment of conviction, the court reduced the conviction under Count II to robbery as a Class C felony, the conviction under Count III to intimidation as a Class A misdemeanor, and the conviction under Count IV to criminal recklessness as a Class B misdemeanor. Appellant's App. p. 17. The court then sentenced Sims to

[2] Ind. Code § 35-42-5-2.

[3] Ind. Code § 35-42-5-1.

[4] Ind. Code § 35-45-2-1(b)(2).

[5] Ind. Code § 35-42-2-2(c)(2).

[6] Ind. Code § 35-44-3-3(b)(1).

[7] I.C. § 35-44-3-3(a).

eighteen years on Count I, three years on Count II,[8] one year on Count III, 180 days on Count IV, three years on Count V, and one year on Count VI. *Id.* The court ordered the sentences for Counts I, II, III, IV, and VI to run concurrently and the sentence for Count V to be served consecutive with Count I, resulting in an aggregate sentence of twenty-one years. *Id.*

Sims, by appointed pauper counsel, filed a timely notice of appeal. Appointed counsel subsequently filed an appellate brief on Sims's behalf ("Appellant's Br. (By Counsel)"). After counsel filed the brief, Sims became unhappy with counsel's appellate representation.[9] He initially filed a motion to strike a portion of his counsel's appellate brief.[10] He then filed a motion with this Court to discharge counsel and requesting permission to file a *pro se* appellate brief. We permitted Sims to proceed *pro se* and accepted his additional brief, which we will treat on appeal as a supplemental brief

[8] The trial court's abstract of judgment indicates that it imposed a three-year sentence for Sims's conviction under Count II, Appellant's App. p. 17, and the State and Sims reiterated this in their appellate briefs, Appellee's Br. p. 2; Appellant's Br. (*Pro Se*) p. 2. However, the trial court's oral sentencing statement indicates that it imposed a seven-year sentence on Count II, Tr. p. 120, and Sims's original appellate brief, filed by an attorney, reiterated this sentence, Appellant's Br. (By Counsel) p. 2. Neither party has raised any argument relating to this apparent discrepancy, and, in any event, it has no bearing upon Sims's sentence because his sentence for Count II runs concurrent to his longer sentence for carjacking, which is not disturbed by our decision.

[9] Sims's discontentment is not limited to his appellate counsel. The transcript also reveals that Sims repeatedly expressed discontent with his appointed trial attorney's representation and strategy and expressed desire at one point to proceed without counsel at trial.

[10] Sims quarreled with this counsel's request for relief. Counsel's brief asks this Court to vacate the judgments for Counts II and IV. Appellant's Br. (By Counsel) p. 13. Sims desires a different outcome. He asks us to vacate the judgments under Counts I and II. *See* Motion to Strike Conclusion in Appellant Brief (filed Mar. 5, 2008).

("Appellant's Br. (*Pro Se*)"). *See* Order Dated 3/25/08. We now address the arguments raised in Sims's appellate brief and supplemental brief.[11]

Discussion and Decision

Sims raises two issues on appeal. First, he contends that his convictions for carjacking and robbery violate double jeopardy principles. Second, he contends that his

[11] Since taking over the reins on his appeal, Sims has filed a number of motions with this Court:

· On May 1, 2008, Sims filed a motion entitled "Motion to Reverse the Decision of the Trial Court With Prejudice and Order of Writ of Habease [sic] Corpus." He based his request for relief in this filing upon his mistaken belief that the State failed to timely file its Appellee's Brief. We denied this motion in an order issued May 9, 2008.

· On May 13, 2008, Sims filed a motion entitled "Motion to Strike the Appellee's Brief With Prejudice and Order of Habeas Corpus." Sims asks us to strike the State's entire brief because the State erroneously wrote that he was convicted of Class B felony robbery instead of Class C felony robbery. He argues,

> The Appellee's stated in the statement of the case of the Appellee's Brief, that the Appellant Mr. Sims appeal from his convictions for count (I) Carjacking A class B felony; Robbery A class B felony. The Appellee's commit perjury and Judicial misconduct. . . . When the Appellee's made such statement in the statement of case of the Appellee Brief was prejudice and as well as vindictive, in violation of Art. 1 § 18. The Appellee's changed the nature of the Appellant Mr. Sims case at hand, as well the elements, by stating that the Appellant was convicted of a class B Robbery prevents the Appellant of a fair appeal.

Sims cites no authority for his proposition that the State's entire brief should be stricken for its mistake, nor is there any indication that this error was intentional or malevolent. While it is preferable for briefs to be fully accurate, Sims is in no way prejudiced by the State's misstatement here. We are aware that Sims was convicted of robbery as a Class C felony. His motion is DENIED.

· On July 11, 2008, Sims filed a motion entitled "Motion for Summary Judgment on the Appellant Motion to Strike the Appellee's Brief With Prejudice and Order a Writ of Habeas Corpus." He cites several federal rules of civil procedure in support of his claim. Sims's motion reflects an unfamiliarity with Indiana criminal appellate procedure. Summary judgment falls within the civil litigation paradigm; it is not something that courts grant in criminal cases. Further, this motion seems to be merely a request that we speedily rule favorably on his May 13, 2008, motion. In today's opinion, we deny the earlier motion. Likewise, Sims's July 11, 2008, motion is DENIED.

· On July 14, 2008, Sims filed a motion entitled "Motion to Compel Attorney Michael R. Fisher to Produce the Appellant Files." Sims cites Indiana Code § 33-21-1-9 in support of his motion. Indiana Code § 33-21-1-9 has been repealed, and Sims does not indicate what documents he believes he will receive from Attorney Fisher (his former appellate counsel) to which he does not already have access through the Appellant's Appendix and Transcript in this case, which Attorney Fisher filed on his behalf. We note that Sims also believed that his trial counsel withheld documents from him, despite trial counsel's reminder to Sims, on the record, that they had compared their files. Tr. p. 114-15. This motion is DENIED.

twenty-one year sentence is inappropriate in light of the nature of the offense and his character.

I. Double Jeopardy

Sims contends that his convictions for carjacking and robbery violate Indiana's prohibition against double jeopardy.[12] Article I, § 14 of the Indiana Constitution, Indiana's Double Jeopardy Clause, provides, "No person shall be put in jeopardy twice for the same offense." The Indiana Supreme Court set forth two analyses for double jeopardy claims under our state constitution in *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999). In *Richardson*, our Supreme Court established that two or more criminal offenses violate our Double Jeopardy Clause if, with respect to either the statutory elements of the charged offenses or the actual evidence used to convict, the essential elements of one challenged offense establish the essential elements of the other offense. *Id.* Under the "actual evidence" test, "the evidence presented at trial is examined to determine whether each offense was proven by separate and distinct facts." *Storey v. State*, 875 N.E.2d 243, 248 (Ind. Ct. App. 2007) (citing *Richardson*, 717 N.E.2d at 53), *trans. denied*. When a defendant makes the claim that two or more convictions violate the "actual evidence" test, he or she must demonstrate a "reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." *Richardson*, 717 N.E.2d at 53.

[12] Sims also contends that his convictions violate the federal prohibition against double jeopardy. However, because we find in his favor on state law grounds, we need not address his federal constitutional argument.

Sims argues that there is a reasonable possibility the actual evidence used to convict him of both carjacking and robbery was the same. To convict Sims of carjacking, the State had to prove that Sims

> knowingly or intentionally t[ook] property from another person or from the presence of another person:
> (1) by using or threatening the use of force on any person; or
> (2) by putting any person in fear[.]

I.C. § 35-42-5-2. In order to convict Sims of robbery as a Class C felony, the State had to prove that Sims

> knowingly or intentionally t[ook] property from another person or from the presence of another person:
> (1) by using or threatening the use of force on any person; or
> (2) by putting any person in fear[.]

I.C. § 35-42-5-1. The State's charging informations closely follow these statutory provisions. Under Count I, the State alleged:

> ANTONIO SIMS, on or about JUNE 17, 2007, did knowingly take from the person or presence of KATHY GERMANN a motor vehicle, that is: 1995 PLYMOUTH VOYAGER, by putting KATHY GERMANN in fear or by using or threatening the use of force on KATHY GERMANN[.]

Appellant's App. p. 23. Under Count II, the State alleged:

> ANTONIO SIMS, on or about JUNE 17, 2007, did knowingly, while armed with a deadly weapon, that is: PELLET GUN, take from the person or presence of KATHY GERMANN property, that is: A PURSE, by putting KATHY GERMANN in fear or by using or threatening the use of force on KATHY GERMANN[.]

Id. at 24. The trial court did not ultimately convict Sims of committing robbery while armed with a deadly weapon. Thus, the only difference between the elements of Sims's convictions for carjacking and robbery was the item that was taken: under Count I Sims was accused of taking a vehicle, while under Count II Sims was accused of taking a

purse. *Id.* at 23-24. Despite this difference, the actual evidence used to convict Sims under both counts was precisely the same: Sims knowingly put Kathy in fear or threatened the use of force on her and was therefore able to drive away in Sarah's van, which contained the purse. Sims's taking of the purse is inextricably tied to his taking of the van. We conclude that there is a reasonable possibility that the evidentiary facts used to establish the essential elements of carjacking were also used to establish the essential elements of robbery. Thus, Sims's convictions for carjacking and robbery violate Indiana's constitutional prohibition against double jeopardy and one must be vacated.

Sims's convictions for carjacking and robbery are further prohibited under Indiana's single larceny rule. The single larceny rule provides that "when multiple items of property are taken at the same time and from the same place, there is but a single larceny, irrespective of whether the property belonged to one or several people." *Beaty v. State*, 856 N.E.2d 1264, 1271 (Ind. Ct. App. 2006) (emphasis omitted), *trans. denied*. Where there is a single larceny, "there may be but one judgment and one sentence." *Johnson v. State*, 749 N.E.2d 1103, 1110 (Ind. 2001). "The rationale behind this rule is that the taking of several articles at the same time from the same place is pursuant to a single intent and design." *Benberry v. State*, 742 N.E.2d 532, 536 (Ind. Ct. App. 2001) (citing *Raines v. State*, 514 N.E.2d 298, 300 (Ind. 1987); *Jenkins v. State*, 695 N.E.2d 158, 162 n.4 (Ind. Ct. App. 1998)).

The State argues that the single larceny rule does not bar convictions for both carjacking and robbery as long as the two convictions relate to separate items of property. In support of this argument, the State cites *Goudy v. State*, 689 N.E.2d 686 (Ind. 1997),

reh'g denied, which addressed whether carjacking is a lesser-included offense of Class A felony robbery (robbery that results in serious bodily injury to a person other than the defendant). *Goudy* held that the two offenses were identical but for the element of serious bodily injury if they related to the taking of the same property. The *Goudy* Court then noted, "[W]e emphasize that Carjacking would not necessarily always be an included offense within Robbery. If a person was convicted of Carjacking for the taking of a motor vehicle and of Robbery for the taking of some *other* property, then *ordinarily* no *'included offense' problems* would arise." *Id.* at 698 (emphasis in original and emphases added). We fully agree. However, *Goudy* did not engage in a discussion of whether the two convictions could be barred on Indiana double jeopardy grounds,[13] nor did it discuss the application of the single larceny rule to these convictions. We find *Raines v. State* to be more apposite. In *Raines*, the defendant stole a truck that contained scuba diving equipment. Raines was convicted of, among other things, separate thefts of the truck and scuba equipment. He challenged these convictions under the single larceny rule, and our Supreme Court reversed one theft conviction, reasoning, "We . . . hold that the theft of the truck and scuba diving equipment, though separately charged, constituted but one offense for which there may be but one judgment and one sentence." *Raines*, 514 N.E.2d at 301. Likewise, here, Sims stole a vehicle that contained a purse, and he was convicted of stealing both. Pursuant to the single larceny rule, this was impermissible. *Id.*; *see also Jenkins*, 695 N.E.2d at 162 (concluding that convictions for carjacking and robbery

[13] *Goudy* was decided before *Richardson*.

involving a purse in the stolen car were barred by single larceny rule). We therefore reverse Sims's conviction for Class C felony robbery.

II. Inappropriate Sentence

Sims also contends that his twenty-one year sentence is inappropriate in light of the nature of the offense and his character. Article VII, § 4 of the Indiana Constitution provides the appellate courts of this state the "power to review all questions of law and to review and revise the sentence imposed" in all appeals of criminal cases. Ind. Const. art. VII, § 4. We exercise this authority under the standard set forth in Indiana Appellate Rule 7(B): "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Although we are reluctant to substitute our judgment for that of the sentencing court, *Hunter v. State*, 854 N.E.2d 342, 344 (Ind. 2006), we will do so where the considerations embodied in Appellate Rule 7(B) compel us to conclude that a defendant's sentence is inappropriate.

Concerning the nature of Sims's offenses, he brandished a pellet gun in order to scare his victim while he entered the van in which she was seated. He threatened to kill her as she struggled to comply with his order that she exit the van, telling her, "not to look at him or he would 'blow [her] f***ing head off.'" Ex. p. 41. He then drove away with the van and its contents. After police located Sims, he led them on a high-speed chase through an urban area and almost struck another vehicle as he drove into oncoming traffic to avoid apprehension. Tr. p. 56. Sims eventually jumped out of the stolen van and ran

before police caught him. *Id.* at 57. The nature of Sims's offenses does not render his aggregate twenty-one year sentence inappropriate.

As for his character, Sims points out that he fully confessed to police shortly after his arrest and insisted, contrary to his trial counsel's wishes, that his statement to police be introduced into evidence at trial. He also points to his claim at the time of his arrest that he wanted to be caught because his motivation for the crime was to get the attention of police so that he would be hired as a confidential informant. Appellant's Br. (By Counsel) p. 11-12. However, as the trial court observed at the conclusion of his sentencing hearing, Sims has an extensive and serious criminal history that involves threatening others and stealing property. As the trial court noted:

> Mr. Sims has a true finding for intimidation as a juvenile. Finding a true finding for auto theft as a juvenile. As an adult he's been convicted of three felonies, possession of cocaine, a robbery and robbery. For each of these felonies he was placed on probation, and each time he was on probation he violated that probation. . . . That pretty much put Mr. Sims near the top in terms of maximum sentence being reserved for the worst of the worst.

Tr. p. 119-20. Sims's criminal history indicates disregard for the law and an unwillingness to conform his behavior to acceptable standards. His twenty-one-year sentence for two felonies and three misdemeanors is not inappropriate in light of his character.

Conclusion

We reverse Sims's conviction for robbery as a Class C felony and remand to the

trial court to enter a revised sentencing order not inconsistent with this opinion. We otherwise affirm.

MAY, J., and MATHIAS, J., concur.